Norris/O'Bannon, a Dover Resources Company *and* International Association of Machinists and Aerospace Workers, AFL–CIO. Case 17–CA–15134

July 10, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On March 18, 1992, Administrative Law Judge William J. Pannier III issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

We agree with the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Alfred Wells on July 13, 1990, because of his union activity.[3] The Respondent contends that Wells was discharged on July 13 for unsatisfactory performance. In its termination letter to Wells, the Respondent cited the following as the basis for his discharge: a verbal warning about his attitude around the first of the year, a written warning for attitude and inability to accept corrective discipline on April 24, 1990, and exhibiting belligerence when asked by Danny Chambers to grind some chasers on July 13. We note that Wells had been repeatedly admonished about his belligerent attitude and failure to service the operators promptly since at least as early as February 1989 when he received a so-called final written warning. It is undisputed, however, that each instance of discipline for these problems, even after the ''final'' warning, was limited to a verbal or written warning. At the time of his discharge, Wells had attained the top pay level for his classification.

In its exceptions, the Respondent claims that the fact that it could have, but did not, fire Wells when it had other opportunities is ''strong evidence of a lack of illegal motive.'' We disagree.

The record establishes that the Respondent was well aware of Wells' performance problems. Until July 13, the Respondent's reaction to these problems was to issue him warnings, but to continue to employ him with no denial of pay increases.[4] On July 13, however, the Respondent's attitude toward Wells suddenly changed and it chose to discharge him for conduct similar to that which he had engaged in since at least February 1989. There is no apparent reason for this abrupt change except for the fact that the Respondent learned that Wells had arranged for the employees to meet with union representatives on July 13. Thus, the inference is fully warranted that it was Wells' increased union activities that led the Respondent to terminate Wells, not his job performance. Accordingly, we agree with the judge that the Respondent did not meet its burden under *Wright Line*[5] of showing that Wells would have been discharged on July 13, 1990, even in the absence of his union activities.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Norris/O'Bannon, a Dover Resources Company, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Remove from its files any reference to the unlawful discharge and notify Alfred Wells in writing that this has been done and that the discharge will not be used against him in any way.''

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order to require the Respondent to remove from its files any reference to the unlawful discharge of Alfred Wells on July 13, 1990. We shall also substitute a new notice to employees.

[3] In finding that the Respondent unlawfully discharged Wells, we do not rely on the judge's finding that the Respondent shifted its defense during the hearing from that expressed in the termination letter to Wells.

[4] Based on the credited testimony of Alfred Wells, the judge found that Wells received regular wage increases throughout his employment with the Respondent. Wells testified that he was hired at $9 an hour and, after his 6- to 8-week probationary period, was raised to $12 an hour. Thereafter, he received wage increases ''every 60 days or so.'' At the time of his termination, Wells was earning $13.07 an hour. The Respondent excepted to the judge's finding, but failed to produce evidence to support its assertion that Wells did not receive regular wage increases. In light of the Respondent's failure to do so, we adopt the judge's finding, based on Wells' unrebutted testimony, that Wells received regular pay increases.

[5] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Association of Machinists and Aerospace Workers, AFL–CIO or any other labor organization.

WE WILL NOT interrogate you about your activities on behalf of any labor organization.

WE WILL NOT maintain rules that prohibit employees from soliciting for purposes protected by Section 7 of the Act during nonworking time or from distributing literature for purposes protected by Section 7 of the Act during nonworking time in nonworking areas of our Tulsa, Oklahoma facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Alfred Wells immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make Alfred Wells whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the discharge of Alfred Wells and notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL rescind or modify the rules appearing in our employee handbook so that you are not prohibited from soliciting for purposes protected by Section 7 of the Act during nonworking time and so that you are not prohibited from distributing literature for purposes protected by Section 7 of the Act during nonworking time in nonworking areas of our Tulsa, Oklahoma facility and WE WILL distribute to each of you a copy of the employee handbook with the rules so rescinded or modified.

NORRIS/O'BANNON, A DOVER RESOURCES COMPANY

Francis Arnold Molenda, for the General Counsel.
Richard L. Barnes (Evans, Johnson & Barnes), of Tulsa, Oklahoma, for the Respondent.
Lou Brogna, of Dallas, Texas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM J. PANNIER III, Administrative Law Judge. I heard this case in Tulsa, Oklahoma, on May 22, 1991. On February 14, 1991, the Regional Director for Region 17 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing, based on an unfair labor practice charge filed on July 31, 1990,[1] and amended on September 4, alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, on the briefs that were filed, and on my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material, Norris/O'Bannon, a Dover Resources Company (Respondent), has been a corporation with an office and place of business in Tulsa, Oklahoma, where it engages in the manufacture of subsurface pumps and butterfly valves. In the course and conduct of those business operations during the 12-month period ending January 31, 1991, Respondent purchased and received at its Tulsa facility products, goods, and materials valued in excess of $50,000 directly from points outside of the State of Oklahoma and, further, sold and shipped from its Tulsa facility products, goods, and materials valued in excess of $50,000 directly to points outside the State of Oklahoma. Therefore, I conclude, as admitted in the answer, that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

At all times material, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) has been a labor organization within the meaning of Sectioin 2(5) of the Act.

[1] Unless stated otherwise, all dates occurred in 1990.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and Issues*

At all times material prior to November Respondent maintained two rules, among the miscellaneous ones in effect at its Tulsa facility, that are alleged to have violated Section 8(a)(1) of the Act:

> 9. No soliciting or selling on Company premises at any time without prior official approval of the Company.
>
> 16. No distribution of literature or printed matter of any kind in any work area during work periods anywhere on the Company premises, posting notices, signs, or writing in any form anywhere on the Company premises unless specifically authorized to do so by the Company.

Although not conceding that these rules were unlawful, Respondent argues that it posted a notice disavowing their continued maintenance and, further, that they were changed in the course of attempting to settle the allegations pertaining to them. Accordingly, urges Respondent, those allegations involve a subject that has been rendered moot.

The primary allegation in this case pertains to the termination of first shift tool and cutter grinder Alfred Wells on July 13. By that date, Wells had been employed by Respondent for almost 3 years. During that period, he had received both verbal and written warnings concerning his ability and willingness to work with other employees. Respondent argues that his termination had been nothing more than an outgrowth of that misconduct, culminating in yet another incident of it during the morning of July 13. The General Counsel, however, contends that the termination had resulted from Wells' involvement in an organizing campaign among Respondent's employees that had led to a meeting between them and officials of the union scheduled for late afternoon on July 13.

Finally, the complaint alleges that Respondent independently violated Section 8(a)(1) of the Act when, after Wells had been terminated on July 13, then-Day Shift General Foreman Ray Chambers, an admitted statutory supervisor and agent of Respondent, had interrogated an employee concerning the union activity of employees. For the reasons set forth post, I conclude that a preponderance of the evidence supports the complaint's allegations that Respondent unlawfully discharged Wells and, further, that it unlawfully interrogated an employee concerning union activity and maintained unlawful no-solicitation and no-distribution rules.

B. *Findings of Fact*

Wells began working for Respondent as a second-shift tool and cutter grinder on July 28, 1987. After completing his probationary period, he continued performing that work on that shift, under the direct supervision of then-Second Shift General Foreman Dennis McCully, an admitted statutory supervisor and agent of Respondent at all times material, until February 19. On that date he was transferred to the first shift where he worked as a tool and cutter grinder, initially under the direct supervision of then-Leadman Johnny Lee Six and, after March 19, under the direct supervision of Small Parts Leadman Rodney Eastham, an admitted statutory supervisor and agent of Respondent at all times material. As set forth in its employee handbook, until the top level of pay classification is reached, Respondent reviews each employee's performance every 2 months to determine whether an increase is warranted. Under that system, Wells' pay rate had progressed steadily to the top level while employed by Respondent. So far as the evidence shows, he was never denied an increase on the occasion of any one of those 2-month performance reviews. However, on Friday, July 13, he was given a letter, signed by then-Day Shift General Foreman Ray Chambers, an admitted statutory supervisor and agent of Respondent at all times material, that reads, inter alia:

> Al you are being terminated for unsatisfactory performance effective today, July 13, 1990. You are being paid for your time worked from July 9 through today, as well as your vacation.
>
> Since the first of the year you have been verbally disciplined about your attitude as it relates to job performance, and on April 24, 1990 you were given a written warning for attitude and inability to accept corrective discipline following an incident on April 23 when I talked with you about spending too much time on the phone.
>
> This morning when approached by Danny Chambers to grind some chasers, you exhibited belligerence, and Danny was forced to get it taken care of through another person. This kind of belligerence has resulted in operators being reluctant to come to the tool room for tools and service. You have a documented history of unsatisfactory performance from the date of your hire through the inability to correct this belligerence and accept corrective action. This cannot be tolerated in a service department.

Credited and corroborated testimony shows that Wells had been regularly advocating unionization of Respondent's employees since at least the late summer of 1989. But, so far as the record discloses, not until the following June did Wells proceed beyond the stage of merely discussing the subject with other employees. Early that month he spoke about unionizing with Gerald Williams, who formerly had worked as a maintenance man for Respondent but who, by then, was working for another employer. Williams mentioned that he worked with the Union's financial secretary, Clarence ''Popeye'' Gobdard, and would ask Gobdard to call Wells. On June 22 Gobdard did so. On June 28 the two of them met at the Union's office where Gobdard explained the organizing process and Wells signed an authorization card. Then, during a telephone conversation on July 9, the two men agreed to conduct a meeting at Hardee's Restaurant after work on Friday, July 13, between the Union's officials and whichever employees Wells wanted to attend.

Following that telephone conversation Wells spoke with some employees concerning the meeting. He testified that he had telephoned general machinist Lloyd McCracken and then-painter Robert Montgomery to inform them about it and to encourage them to attend it. He testified that he also spoke with employees Paul Jarvis and Kevin Littrel during lunch period while in the lunchroom of Respondent's Tulsa facility. Wells further testified that during that lunchroom conversation 15 to 20 other people had been present, including

Leadmen Danny Chambers, Rod Eastham, and Clint Underwood.[2]

Neither Jarvis nor Littrel appeared as a witness. But McCracken did testify and he agreed that he had discussed the Union's meeting with Wells on the telephone and, also, during a lunchroom conversation when Leadmen Eastham, Underwood, and Danny Chambers, as well as Leadman Rod Green, had been present. Significantly, both Eastham and Danny Chambers appeared as witnesses for Respondent, but neither one denied having overheard Wells' lunchroom discussion of the Union's meeting. Indeed, neither one of them denied having known, from whatever source, that Wells had arranged for a meeting between union officials and Respondent's employees after work on July 13. And the evidence discloses other sources of information concerning that meeting.

Every witness interrogated regarding the subject testified that information and rumors circulate rapidly through Respondent's facility. For example, Six, Wells' former leadman during the latter's first month on day shift, testified, ''When Al [Wells] got fired, I guess everybody knew it in fifteen minutes.'' Similarly, McCracken testified that someone had informed him of that termination and, further, that it was common for information to circulate rapidly through the Tulsa facility: ''Seems like what we find out comes down through the grapevine before we get it on the bulletin board.''

Of greater import to the termination of Wells, there is evidence that word had spread concerning both the union meeting and the role of Wells in arranging it. Some of it had originated with comments made by Wells, himself. For example, before setting up the Hardee's meeting he had agreed to participate in a golf outing on the night of July 13 with, among others, Six. Six testified that, in the course of bowing out of that commitment, Wells had said that he had a union meeting to go to that night.

In like vein, General Products Leadman Jimmy Warren testified that he had been told by Wells that the latter had set up a union meeting for that Friday. Although Warren denied having repeated that comment to anyone in management, it is clear that he was not reluctant to relate to others what Wells had said. For, Jimmy Warren did not deny having told Montgomery ''that he [Warren] heard that there was going to be a meeting at Hardee's.''[3] Montgomery further testified that he had been told by phone operator Keith Bell that Wells was ''passing word all over the shop that Union officials will be here and Gerald Williams had made the contact for them.'' And, Leadman Warren's brother, turret lathe operator Gary Neal Warren, testified that he had heard that there was going to be a union meeting on Friday night, although he could not recall who had told him. In sum, there is ample basis for concluding that, during the week preceding Wells' termination, as Montgomery testified, ''There was any number of people knowing about'' Wells' arrangements for the Union to meet with employees of Respondent.

Of course, a union meeting turned out not to be the principal event of July 13. During the afternoon of that day Wells was terminated. There is no dispute that during the morning machinist Ronald Henderson, who was supervised by Danny Chambers, had gone to the toolcrib, where Six and Wells were working as grinders, seeking to have some chasers sharpened or ground. Nor is there any dispute that Henderson first asked Six to do so, but that Six replied that he was unable to do so because he was working on a special project for Eastham, by then the immediate supervisor of both Six and Wells. Six suggested that Henderson ask Wells if he could perform the work. All agree that Henderson then approached Wells. According to Henderson, Wells had ''just got[ten] off the telephone,''[4] and, when Henderson inquired about grinding the chasers, Wells ''just looked straight at me and said, who the hell [do] you think I am. God[?]'' Henderson testified that he immediately left the toolcrib and reported what had been said to his supervisor, then-Valve Manufacturing Department Leadman Danny Chambers. The latter testified that during the morning of July 13, Henderson had reported ''that he wanted to have the chasers reground and he took them to Al, and Al said, who in the hell do you think I am, God.''

In contrast, Wells testified that, during the morning of July 13, he had been grinding a tool for turret lathe operator Warren when Henderson had asked about grinding the chasers ''real quick.'' In response, testified Wells, ''I said, man, I said, I've got a man waiting on me up at the window. I said, Gary Warren's up here and I said, I can't, I can't get to them

[2] During cross-examination Wells conceded that he had stated in a prehearing affidavit that no supervisors had been present on this occasion. Yet, while it is accurate that Wells did not always appear to be testifying with complete candor, it cannot be said that this particular statement in his affidavit contradicts his testimony concerning the three leadmen's presence in the lunchroom that day. When he initially testified concerning the subject, Wells was asked if any supervisors had been present in the lunchroom and he answered, ''Well, I don't know. There was a lead man in there. I don't know if you call them supervisors or not.'' Indeed, there was dispute concerning the supervisory status of leadmen prior to the hearing. While admitting in its Answer that all other alleged officials were statutory supervisors, Respondent denied that Eastham and Danny Chambers, the only leadmen specified in the complaint, could be so characterized. Only after the hearing opened did Respondent amend its answer to eliminate that denial. Accordingly, given the uncertainty as to leadmen's supervisory status prior to the hearing, it cannot truly be said that an inconsistency exists because Wells testified that leadmen had been present in the lunchroom after having stated in his affidavit that no supervisors had been present there when he discussed the Union's meeting with Jarvis and Littrel.

[3] Montgomery was uncertain whether he had been told this by Jimmy Warren before or after Wells' termination. However, Warren's use of the future tense—''going to be a meeting''—shows that Warren had to have said this to Montgomery by July 13, at the latest.

[4] Respondent does not argue that Wells had improperly been on the telephone on this particular occasion. However, it did present evidence that on other occasions Wells had remained talking on the phone, ignoring machinists and other employees who sought toolcrib service. Yet, Eastham admitted that, after having come to day shift, there had been occasions when Wells, as well as Six, needed to use the phone, such as whenever toolcrib attendant Richard Hughes was absent and it was necessary to check on a traveling requisition or call a vendor, or whenever Kathy Taylor, apparently a buyer, was busy or unavailable. Further, McCully testified that when Wells had been on second shift, he had worked alone in the toolcrib and had to take outside calls there because the switchboard had then been closed for the day. Although McCully testified that he eventually had the number transferred to his office, so that it would no longer be necessary for incoming calls to be taken in the toolcrib, McCully did not recall when that had occurred in relation to Wells' transfer to first shift.

right now. Just quick as I get this ground, I said, I'll grind them.'' According to Wells, Henderson had simply said that he would get someone else to do the work and had left.

Six agreed that he had been in the toolcrib that morning and, further, agreed that, when requested to grind the chasers, had told Henderson that he was on a special project and had suggested that Henderson ask Wells to do the work. However, apparently Six had gone on working and had not paid attention to the ensuing exchange between Henderson and Wells. But Gary Warren testified that he had been present and had heard that exchange.[5] According to Warren, as he had waited for his tool to be ground by Wells, Henderson approached and inquired about the chasers. Warren testified, ''Al says, soon as he got done with me that he would wait on him. And Al told him he could go ahead and go back there and look if he wanted to, which he did.''[6] Then, testified Warren, ''Al went ahead and sharpened that tool for me.''

Respondent contends that Ray Chambers had been the official who had made the decision to terminate Wells. When he testified, Ray Chambers agreed that he had done so, although he explained that, before becoming final and being implemented, his termination decision had been reviewed and ratified, during a meeting, by Vice President Loyce Green, Plant Manufacturing Manager Rich Legel, and Personnel Manager Judy Johnson.

As quoted above, in its termination letter, Respondent explained that its decision had been based not only upon belligerence assertedly displayed by Wells on July 13, but also because of ''a documented history of unsatisfactory performance from the date of [Wells'] hire through the inability to correct this belligerence and accept corrective action.'' Consistent with that explanation, the evidence does show that, while employed by Respondent, Wells had displayed attitude problems that had upset Respondent's officials. Thus, McCully testified that, during the 2 years and almost 8 months that he had supervised Wells on the second shift, there had been frequent complaints by other second-shift employees that Wells ''wouldn't issue them a tool or something. He was busy, he was talking on the phone and this and that.'' In addition, though McCully had been Wells' immediate supervisor on second shift, Six, then first-shift toolcrib leadman, had been the official who had laid out the work that Wells was to perform during the second shift. Both McCully and Six testified that Wells regularly had failed to complete those assignments. As a result, Six had complained to McCully. At a meeting on August 25, 1988, McCully had warned Wells that he was expected to perform the work in the manner laid out by Six and that Respondent could not continue employing Wells if he was unwilling to do the job in that manner. Both at that time and on other occasions Wells complained that he did not believe Six was qualified.

Respondent's problems with Wells continued until, after additional meetings with Wells had been conducted by Respondent's officials earlier that same month, a final warning was issued by McCully to Wells on February 23, 1989. That warning recited:

> This final written warning is to confirm our meeting on 2–14–89 concerning your unacceptable attitude towards your job as a tool grinder.
>
> I told you that you would be required to receive and accept instructions from the lead man in the tool grinding dept. as to what tools you were to grind, the proper grind for the tools and the reasonable quantity to be ground. I told you that you would be required to communicate any problems concerning these matters with the lead man.
>
> I told you that in the future if you failed to meet any of these requirements you would be terminated.

Thereafter, Wells described certain personal problems that he was experiencing to McCully. In light of that description, McCully decided that he would attempt to resolve Wells' work-related problems and, thus, told Plant Manufacturing Manager Legel, ''I didn't want to terminate Al, because of the personal problems he had told me about.'' However, McCully's efforts proved unavailing and, finally, he asked Legel ''to take Al off my shift,'' because ''I wasn't able to get to him. I wasn't going to change anything.''

Wells was transferred to the first-shift toolcrib on February 19 where he continued working as a grinder. Until March 19 he was supervised by Six. However, by that date, Respondent had decided that the department was too small to justify separate full-time supervision and, consequently, Six was made a full-time grinder, with supervision of toolroom employees being added to Leadman Eastham's responsibilities. Thereafter, Wells would be directly supervised by Eastham until the July 13 termination.

Neither Six nor Eastham complained about the volume of work turned out by Wells during that 5-month period. Moreover, Eastham testified that, ''as far as his qualifications, his grinding tools, I just had a very few complaints about tool[s] not being ground right.'' However, testified Eastham, ''I had several complaints about him not servicing operators'' from both employees and other supervisors. According to Eastham, those complaints were received ''at least once a week about something.'' Indeed, during April, Eastham received a complaint from Leadman Danny Chambers about a valve employee not being served because Wells had been on the telephone. After Eastham discussed the complaint with Wells, ''ask[ing Wells] to handle the operator at the window and limit his phone,'' an angry Wells confronted Danny Chambers, demanding to know the identity of the complaining employee. Ultimately, that outburst led to a meeting with Ray Chambers and to issuance of a written warning to Wells on April 25:

> This is to confirm our discussion on Tuesday April 24, 1990 concerning your actions on Monday Apr. 23, 1990. You were told on April 23, that we had a complaint about you being on the phone and not waiting on someone at the tool room window. You were told to be

[5] During cross-examination Warren acknowledged that he had gone to the toolcrib on more than one occasion that morning, thereby raising at least the possibility that he might have heard an exchange different from the one referred to by Henderson. Yet, neither the latter nor Wells testified that Henderson had been to the toolcrib by himself on more than one occasion that morning to have chasers ground. Accordingly, it would be sheer speculation to conclude that Gary Warren had heard some exchange between Henderson and Wells on July 13 that differs from the one about which Respondent complains.

[6] Already prepared items are stored in the toolcrib.

> sure and not spend a long time on the phone. Your reaction to this was not acceptable. You not only argued with your leadman but you also left the toolcrib and confronted another leadman about it. Because of your short temper and attitude towards constructive criticism and supervision you will be required to bring any and all complaints directly to Ray Chambers through a scheduled meeting. I asked you if you had a problem with this and you said no.
>
> If you fail to comply with this rule then you will be subject to disciplinary action up to and including termination.

Wells testified that, save for a warning about attendance, he ''never had another warning except until the day that I was terminated.'' However, Ray Chambers testified that he had spoken to Wells on June 26 about ''a lack-a-daisical attitude'' toward getting work done and, again, on June 27 about not waiting on operators when they came for service to the toolcrib. In a list of disciplinary actions pertaining to Wells, Personnel Manager Johnson listed both of these conversations as verbal warnings. But Ray Chambers' testimony regarding these purported warnings inaugurated a series of inconsistencies—some major, others less central, but nonetheless material—that, in the end, undermine Respondent's asserted motivation for terminating Wells and the generalized testimony of Ray Chambers intended to support it.

In its posthearing brief, Respondent characterizes the above-quoted April 25 warning letter, from Ray Chambers to Wells, as a ''second final warning.'' However, that characterization is not supported by examination of the April 25 letter. Although it concludes by warning of possible future disciplinary action, including discharge, in contrast to the above-quoted February 25, 1989 warning—which states explicitly that it is a ''final written warning'' and that future failure to satisfy its enumerated requirements would result in termination—at no place does the April 25 letter state that it constitutes a final warning. Moreover, if it had actually been a final warning, and if Ray Chambers truly had twice become upset by Wells' June attitude and performance, then presumably Wells would have been fired in June, in view of the now-claimed ''second final warning'' issued 2 months earlier. But Wells was not terminated in June and the failure of Respondent to do so, in view of the circumstances then purportedly existing, was never explained by Ray Chambers nor by any other official of Respondent.

One other aspect concerning the asserted June verbal warnings is significant. During the hearing Respondent produced two documents, each of which purported to be a description of one of the two June incidents involving Wells that had upset Ray Chambers. However, the latter admitted that he had not prepared either one on the date of the asserted warning that it purports to document. Instead, he testified that when he had mentioned the incidents during the July 13 meeting of Respondent's officials to review and decide whether to endorse his decision to fire Wells, someone had questioned why he had not documented those incidents. Ray Chambers testified that he then had done so that very day. But that testimony was contradicted by his prehearing affidavit in which he stated that he had not documented the two purported June verbal warnings until ''after the charge was filed,'' which would mean not until August. Ray Chambers evaded the opportunity afforded him to explain this inconsistency between his testimony and his prehearing affidavit.

The foregoing testimony of Ray Chambers raises, at least, a possible conclusion that Respondent's witnesses were attempting to enlarge upon Wells' misperformance so that the lawfulness of its termination decision would be fortified. Such a conclusion is strengthened by an examination of Danny Chambers' account, during direct examination, that several employees had told him that they were afraid of Wells because of his belligerence—testimony that corresponds to the above-quoted assertion in Ray Chambers' termination letter. Danny Chambers identified Chris Harper as one such employee and, initially during cross-examination, testified that Harper ''told me that he was afraid that, he was, he [was] uncertain enough, he said, he did not have to deal with that situation and harassment, that Al was a lot bigger than he was.'' However, Respondent did not call Harper to corroborate that testimony, although it never represented that Harper was unavailable to it as a witness. And as questioning regarding this subject progressed, Danny Chambers began retreating from his initial assertions, first testifying that Harper had ''just displayed fear'' and, then, that Harper ''didn't come right out and say, I am afraid of Al Wells.'' Ultimately, Danny Chambers made a full retreat on this subject, completely contradicting his own earlier above-described testimony during direct examination by admitting that, aside from Harper, ''I don't believe anybody [was afraid of Wells]. I don't know that anybody else was afraid.'' Indeed, Respondent produced no specific evidence whatsoever of ''operators [who had been] reluctant to come to the tool room for tools and service'' because of any belligerence on the part of Wells.

The testimony of Ray and Danny Chambers did not become more reliable when they testified about the events of July 13. Both testified that, after Henderson had reported to Danny Chambers what Wells assertedly said when Henderson sought to have the chasers ground, Danny Chambers had immediately related that report to Ray Chambers who, in turn, directed Danny Chambers to ask Wells if he had made such a remark to Henderson. According to Danny Chambers, he had followed that direction and Wells confirmed that he had made the statement about not being God to Henderson. Both Ray and Danny Chambers testified that the latter had then reported Wells' confirmation to the former. Ray Chambers testified that, as a result, he had decided to fire Wells. Thus, according to the account of Ray and Danny Chambers, the discharge decision had been precipitated by belligerence displayed to Henderson by Wells. Yet, that account is flatly contradicted by Respondent's own termination letter which had purportedly been prepared at Ray Chambers' direction. For, as quoted above, the letter charges that Wells had displayed belligerence to Danny Chambers, not Henderson. However, at no point when they testified did either Ray or Danny Chambers claim that Wells had displayed belligerence toward Danny Chambers on July 13.

Furthermore, their testimony that Danny Chambers had gone to Ray Chambers before having approached Wells on July 13 is contradicted by other testimony, including that of Henderson whom Respondent called as a corroborating witness. For, he testified that when he had made his report to Danny Chambers, the latter had immediately ''walked back

through the toolcrib with me. Asked Mr. Wells what he had said. And he had said the same thing.'' Of course, though it contradicts the Chambers' account of the sequence of events that morning, Henderson's testimony does tend to corroborate their description that Danny Chambers had spoken to Wells in an effort to confirm what Wells had earlier said to Henderson. Yet, as is true of the Chambers' account, Henderson's description is contradicted by Respondent's termination letter which accuses Wells of belligerence toward Danny Chambers, not Henderson.

Henderson's account also is contradicted by the testimony of Six. Not surprisingly, in light of Wells' repeated past criticisms of his qualifications as toolcrib leadman, Six did not appear to be a fan of Wells. Nevertheless, he did appear to be a truthful witness and he contradicted the Chambers' account of the sequence of events on July 13 and, of greater significance, the accounts of Henderson and Danny Chambers as to what the latter had said that morning when he had come to the toolcrib. For, Six testified, as had Henderson, that Danny Chambers had come to the toolcrib in the company of Henderson. But, instead of having asked what Wells had said to Henderson, Six testified that Danny Chambers had asked, ''Why can't we get any chasers ground[?]'' According to Six, it had been in response to that question that Wells had said, ''Well, I'm busy, said John's busy. What do you think I am, God[?]'' Consequently, Six's testimony, which confirms that of Wells, shows that it had been in response to Danny Chambers' intervention that the comment about God had been made. For, according to Wells, ''I said [to Danny Chambers], we're only two guys. We're not [G]od in here.''

Of course, belligerence toward a supervisor is hardly less serious than belligerence toward a coworker. But, ''mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a decision to discourage union activity.'' *NLRB v. Symons Mfg. Co*., 328 F.2d 835, 837 (7th Cir. 1964). Accord: *Singer Co.* v. NLRB, 429 F.2d 172, 179 (8th Cir. 1980). For example, even were I to conclude that I believed that Wells' misconduct warranted termination, ''Board law does not permit the trier of fact to substitute his own subjective impression of what he would have done were he in the Respondent's position. *Super Tire Stores*, 236 NLRB 877 fn. 1 (1978). Accord: *Hallmark & Son Coal Co*., 299 NLRB 259, 260 fn. 7 (1990). Instead, when evaluating allegations of discrimination, ''the pivotal factor is motive,'' *NLRB v. Lipman Bros., Inc*., 355 F.2d 15, 20 (1st Cir. 1966), because the ultimate ''determination which the Board must make is one of fact—what was the actual motive of the discharge?'' *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 729 (9th Cir. 1969).

Here, the above-described internal inconsistencies in the accounts of Danny and, especially, Ray Chambers, to whom the discharge decision is attributed, as well as the material contradictions between their accounts and other evidence, obliterate any reliance that might otherwise be placed on their testimony concerning the circumstances that led to Wells' termination. Furthermore, Six testified that on July 13 Danny Chambers had been so insistent on having the chasers ground''—''Danny said, well, I've gotta have the chasers ground''—that Six had interrupted the work given him by Eastham and had agreed to grind the chasers. From Six's description of the exchange at the toolcrib, it appears that it had been Danny Chambers' own demanding attitude—that, in effect, any other work should be set aside by one of the grinders to grind the chasers for the employees that Chambers supervised—that had provoked the defensive response by Wells about which Respondent now complains. But, of course, Respondent's position is less supportable if predicated upon the provocation of its own supervisor. Accordingly, disregarding the explanation in the termination letter, as well as the testimony of employees who had witnessed portions of the toolcrib incident on July 13, the Chambers tailored an account that concealed responsibility of Respondent's supervisor for the incident, thereby attempting to fortify a defense of legitimacy for the termination of Wells.

This conclusion is further supported by an event that took place on July 13 after the discharge of Wells. Six testified that he had been approached by Ray Chambers who said that ''Al won't be back,'' and who then asked, ''How was his work, what was he doing, was he doing all right [sic].'' Ray Chambers did not dispute Six's testimony. Nor did he explain what his purpose had been in inquiring about the performance of an already discharged employee. Absent such an explanation, it is a fair inference that Ray Chambers had been seeking some negative information from Six about Wells that could be used to buttress the termination decision. That such an effort was made serves to further support the conclusion that Respondent's asserted defense is not reliable.

In addition to the foregoing remarks, Six testified that Ray Chambers also had asked, during the July 13 conversation, ''if I knew anything about a Union meeting. And I said, no, I don't.'' Ray Chambers did not specifically deny having put that question to Six. Nor did he explain why he had chosen to do so. Instead, he testified that he had been unaware of a union meeting until Eastham had reported that, while escorting Wells from Respondent's facility, the latter had asserted that he was being terminated because of the scheduled union meeting. This report, testified Ray Chambers, had led him to ''just ask[] other supervisors if they had heard anything.'' However, he did not identify any supervisors whom he had purportedly asked if they had heard of a union meeting. Nor did any supervisors appear as witnesses and confirm that such a question had been asked by Ray Chambers. More significantly, while Eastham did appear as a witness for Respondent, he neither testified that he had made such a report to Ray Chambers nor did he testify that any statements had been made to him by Wells concerning a union meeting.

C. *Analysis*

In support of its assertion that, in effect, the General Counsel has failed to establish a prima facie case, Respondent points to the absence of direct evidence that, prior to Wells' termination, Respondent had known that Wells had arranged for the employees to meet with the Union after work on July 13 and, further, to the absence of direct evidence that it harbored animus toward union activities by its employees. Yet, termination of a union activist tends to ''give rise to an inference of violative discrimination,'' *NLRB v. First National Bank of Pueblo*, 623 F.2d 686, 692 (10th Cir. 1980), and ''[t]iming alone may suggest anti-union animus as a motivating factor in an employer's action.'' *NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984). That is, a close relation in time between union activity

and termination of a union activist tends to show that the proximity ''was really no coincidence at all, but rather part of a deliberate effort by the management to scotch the lawful measures of the employees before they had progressed too far toward fruition.'' *NLRB v. Jamestown Sterling Corp*., 211 F.2d 725, 726 (2d Cir. 1954).

Here, there is ample evidence that knowledge of the planned union meeting had become widely disseminated through Respondent's facility prior to the afternoon of July 13. The testimony of Six, McCracken, Montgomery, and Jimmy and Gary Warren, set forth in subsection II,B, supra, shows not only that information generally circulated freely and rapidly through Respondent's facility, but that knowledge of the union meeting and of Wells' role in arranging it had spread throughout the Tulsa facility by the time of Respondent's decision to fire Wells. Although Respondent's officials, particularly Ray Chambers, denied having known of the meeting by that time, their inconsistent and contradictory accounts in connection with the decision to terminate Wells show that their testimony was not reliable. The record reveals no basis for a different conclusion concerning their denials of knowledge, prior to the termination decision, that Wells had arranged a meeting between employees and the Union.

Regarding that termination, the evidence shows that a relatively long-term employee had been abruptly discharged on the day of a union meeting that he had arranged. It is quite clear that his employment history had been marred by incidents of belligerence and indifference to the needs of coworkers. Yet, as set forth in subsection III,B, supra, an employer's motivation is not evaluated by an objective standard—is not based upon an evaluation of what a ''reasonable'' employer might likely have done in the particular circumstances presented. Rather, motivation is evaluated on the basis of the actual standard utilized by the specific employer named as the respondent. Here, while Wells periodically received warnings for having exceeded the bounds of satisfactory conduct tolerated by Respondent, for the most part Respondent took no action concerning his sometimes abrasive conduct. In fact, it rewarded his overall performance by regularly awarding him pay increases whenever it periodically reviewed his performance, with the result that he had attained the top pay level for his classification by July. There is no evidence of even a single instance when his abrasiveness had been viewed by Respondent as having been so disruptive that he was denied a pay increase when the bimonthly review of his performance was conducted.

Not only did Respondent fail to show that Wells' actions on July 13 had been any different from his long-tolerated normal attitude, but there is credible evidence that his reaction on that date could not be characterized as having been belligerent toward Henderson. Gary Warren's testimony confirms that Wells had been performing work when Henderson had inquired about having the chasers ground. There is no evidence that Henderson's needs were entitled to a preference over those of Warren. Consequently, it cannot be said that Wells acted improperly in continuing the work for Warren, rather than setting it aside to grind the chasers for Henderson. Nor can it be said that the remark made by Wells to Henderson at that time had been an improper one. Henderson described a belligerent reference to God. But, putting to the side Wells' account of his response, Gary Warren testified that Wells had expressed willingness to wait on Henderson, but only after completing the work then in progress for Warren. And Henderson's description of that response tends further to be refuted by Respondent's own termination letter which makes no mention whatsoever of belligerence toward Henderson on July 13.

In testifying that Wells had been belligerent to Henderson, Ray, and Danny Chambers dramatically changed Respondent's defense. For its termination letter had charged Wells with belligerence toward Danny Chambers, not Henderson. As pointed out in subsection III,B, supra, that particular change in the asserted misconduct of Wells served to strengthen Respondent's defense. That is, it portrayed Wells' comment about God as an unprovoked one, rather than a defensive response to Danny Chambers' own insistent demand that his employee's chasers be ground and, further, its implicit criticism of Wells and Six's refusal to set aside work in progress to do so. Yet, that portrayal is contrary to the description of the incident by Six and, more significantly, is a change in the supposed infraction that occasioned the discharge decision—a shift in defense that, of itself, is an indication of unlawful motive.

That Ray and Danny Chambers were not reluctant to tailor their testimony to fortify Respondent's defense is further shown by Danny Chambers' ultimately retracted accusation that employees had expressed fear of Wells, because of the belligerence that he assertedly displayed when they dealt with him. In like vein, had the April 25 warning truly been a ''second final warning'' then the conduct attributed to Wells in June by Ray Chambers seems surely to have warranted termination at that time, had it actually taken place. But Wells was not terminated in June. And Ray Chambers' contradictory accounts regarding when he had prepared the documentation of those purported incidents further undermines his testimony that those incidents, and the verbal warnings concerning them, had actually occurred during June. To the contrary, such testimony appears to be another example of an effort to support Respondent's defense by sometimes enlarging upon and sometimes creating past incidents of unsatisfactory conduct by Wells.

Respondent points out that conversations about unionizing had occurred for a long time at its Tulsa facility and, in fact, Wells had been discussing that subject for over a year prior to his discharge. Yet, there is no evidence that, prior to July, any past conversation had ever led to any specific action by any employee to obtain representation. That is, so far as the record discloses, prior to July there had been no actual meetings with union officials to advance whatever generalized desire for representation employees might have entertained. Accordingly, that Respondent never previously retaliated against employees for having merely discussed unionization does not, of itself, refute a willingness to do so in the case of an employee who proceeded beyond mere discussion and arranged for a meeting with union officials as a prelude to a possible organizing campaign. In any event, as Justice Powell, speaking for a majority of the Supreme Court, pointed out in a case involving discrimination, albeit of the racial type, a single act of discrimination ''would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions.'' *Village of Arlington Heights v. Metropolitan Housing Development*, 429 U.S. 252, 266 fn. 14 (1977). That same analysis has been applied to

allegations of discrimination arising under the Act. See, e.g., *NLRB v. W. C. Nabors Co*., 196 F.2d 272, 276 (5th Cir. 1952), cert. denied 344 U.S. 865 (1953); *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964).

In the circumstances reviewed above, the General Counsel has established a prima facie case that Respondent's termination decision had been motivated by its animus toward Wells for having arranged for a meeting between its employees and a representative of the Union. Moreover, in light of the unreliability of the inconsistent and contradictory testimony of Respondent's officials, most particularly of Ray Chambers, Respondent has failed to satisfy its burden of going forward with credible evidence showing that, absent his arrangement for that meeting, Wells would have been fired as a result of his remarks on July 13. Therefore, a preponderance of the evidence establishes that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Wells on July 13 and I deny Respondent's motion to dismiss that allegation.

That conclusion is reinforced by Ray Chambers' questioning of Six regarding Wells' performance. In the circumstances, no purpose existed for that inquiry, and Ray Chambers advanced none, other than to ascertain if additional adverse information could possibly be secured that might, in turn, be utilized to buttress Respondent's discharge decision. In addition, Ray Chambers took advantage of that same conversation to question Six's knowledge of the union meeting scheduled for later that same afternoon. Six had not been an open union supporter. Although the questioning occurred while Six had been at his work station, Ray Chambers was not Six's immediate supervisor, but rather occupied a higher position in Respondent's supervisory chain. Moreover, he had been the official who had decided to fire Wells. Ray Chambers gave no testimony that would supply a statutorily valid reason for suddenly asking an employee about his knowledge of a union meeting. To the contrary, by coupling his question about the meeting with an announcement of Wells' discharge—and without explaining the purpose of the question and assuring Six that his answer would not lead to adverse action, such as Wells had just experienced—the questioning about the meeting conveyed an inherent ''warn[ing] . . . that [Respondent] did not look favorably upon the Union,'' *Northway Nursing Home*, 243 NLRB 544 fn. 1 (1979), thereby naturally tending ''to scotch the lawful measures of the employees before they had progressed too far toward fruition.'' *NLRB v. Jamestown Sterling Corp*., supra. Therefore, by questioning Six concerning his knowledge of the scheduled union meeting, Respondent engaged in coercive conduct that violated Section 8(a)(1) of the Act.

The final issues in this case pertain to the no-solicitation and no-distribution rules, recited in subsection III,A, supra, that existed until November. Respondent moves to dismiss the allegations pertaining to those rules, because they are assertedly moot inasmuch as Respondent posted a notice to employees concerning them for 60 days and, further, changed the rules by November. Neither fact is disputed. However, the General Counsel opposes the motion and, in that regard, points out that the Regional Director neither was specifically notified of the notice's posting nor approved the settlement of which the notice was ''made a part hereof.''

Following investigation of the charge in this matter, the Regional Director decided to proceed to complaint, absent settlement, concerning the questioning of Six and the two rules, but to dismiss, absent withdrawal, the part of the charge alleging that Wells had been unlawfully discharged. There was no withdrawal of that portion of the charge. To the contrary, its dismissal was appealed to the General Counsel. Nevertheless, a settlement agreement pertaining to the questioning and rules was transmitted to Respondent. It was signed by Respondent on September 12 and was then submitted to the Regional Director for approval. However, pending disposition on appeal to the General Counsel of the partial dismissal, the Regional Director did not approve the agreement and, obviously, never approved it once the General Counsel reversed the partial dismissal pertaining to Wells' discharge. In the meantime, beginning on September 12, Respondent posted a copy of the notice incorporated into the Agreement for a 60-day period and modified the two rules in November. While Respondent argues that these facts render moot the allegations concerning the rules, I do not agree.

The settlement agreement expressly provides, inter alia, that, ''Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or . . . upon receipt by the Charged Party of advice that . . . the General Counsel has sustained the Regional Director.'' Further, as noted above, the notice to employees is expressly ''made part'' of the agreement which provides that posting is to commence ''[u]pon approval of this Agreement.'' Consequently, Respondent was on notice when it signed the agreement that it was not final simply because Respondent had signed it—that the Regional Director's, and possibly the General Counsel's, approval was needed for the Agreement to become final.

In addition, the agreement also provides that the signatories ''will each notify the Regional Director in writing what steps the Charged Party has taken to comply herewith. Such notification shall be given within 5 days, and again after 60 days, from the date of the approval of this Agreement.'' Respondent concedes that, other than signing and dating the copy of the notice attached to the agreement that it signed and returned to the Regional Office, it never gave independent notification to the Regional Director either that it had commenced or completed the 60-day period of posting the notice. In the foregoing circumstances, there is no basis for regarding any issue as moot simply because Respondent signed and posted the notice to employees without regard to, and without complying with, any of the provisions of the settlement agreement regarding that notice.

Nor can it be said that Respondent's actions somehow estop the General Counsel from litigating the issues pertaining to the no-solicitation and no-distribution rules that existed until November. An allegation does not become moot simply because a respondent ceases to commit the unfair labor practice underlying that allegation. It might be deemed moot if a respondent effectively repudiates its unfair labor practice. Here, however, Respondent has failed to show that, of itself, mere unapproved posting of a notice to employees satisfies the criteria for effective disavowal set forth in *Passavant Memorial Hospital*, 237 NLRB 138 (1978). Given the nonadmission provision in the Settlement Agreement, it cannot be said that Respondent acknowledged its prior commission of unfair labor practices. Moreover, given the

unremedied unlawful discharge of Wells, it cannot be said that the notice had been posted in a context free of other unfair labor practices. Finally, the entire process of securing partial settlements, to expedite case processing if regional dismissal is sustained regarding other allegations in charges, would be undermined if, in those cases where reversals occur, respondents are permitted to bar litigation of some allegations by prematurely posting notices from unapproved partial settlement agreements encompassing those allegations.

With respect to the substance of the two rules, the Supreme Court has ''long accepted the Board's view that the right of employees to self-organize and bargain collectively . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.'' *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). As a result, ''[n]o restriction may be placed on the employees' right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline.'' *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956). ''The governing principle is that a rule is presumptively invalid if it prohibits solicitation on the employees' own time.'' *Our Way, Inc*., 268 NLRB 394 (1983).

As set forth in subsection III,A, supra, prior to November Respondent maintained a rule that prohibited solicitation ''on Company premises at any time without prior official approval of the Company.'' Such a rule is presumptively invalid. First, it encompasses ''periods from the beginning to the end of workshifts, periods that include the employees' own time,'' *Our Way*, supra, as well as times ''when the employees have completed their shifts but are nevertheless still lawfully and properly on company premises pursuant to the work relationship,'' *Contra Costa Times*, 225 NLRB 1148 (1976). Second, ''any rule that requires employees to secure permission from their employer as a precondition to engaging in protected concerted activity on an employee's free time and in nonwork areas is unlawful.'' *Brunswick Corp*., 282 NLRB 794, 795 (1987). Respondent has presented no evidence of any management interest that might even arguably justify so stringent a restriction on solicitation and, therefore, overcome the presumptive unlawfulness of its no-solicitation rule. Therefore, by maintaining the rule recited in paragraph 9 of its miscellaneous rules until November, Respondent violated Section 8(a)(1) of the Act.

''Rules prohibiting distribution of literature are presumed valid unless they extend to activities during nonworking time and in nonworking areas.'' *St. Joseph's Hospital*, 222 NLRB 1150 (1976). While miscellaneous rule 16 starts out as a facially lawful one—''No distribution of literature or printed matter of any kind in any work area during work periods.''—it continues on by adding the somewhat confusing phrase ''anywhere on the Company premises'' and by then prohibiting ''posting notices, signs, or writing in any form anywhere on the Company premises unless specifically authorized to do so by the Company.'' Nothing in that latter prohibition restricts its scope only to Respondent's own property. To the contrary, it is so broadly worded that, from its face, it appears to encompass notices or signs—such as stickers—affixed to an employee's own personal property—such as a lunch pail—that is located ''on the Company premises.''

Furthermore, although the additional phrase ''anywhere on Company premises'' might be interpreted as a modification of the phrase ''in any work area''—so that it was intended to mean any work area located on Respondent's premises—the sentence, read in its entirety, is so confusingly worded that it does not clearly convey such an interpretation. Moreover, there is no evidence that Respondent operates any work areas that are not on its own premises. Consequently, it would not be illogical for an employee to interpret the sentence, read in its totality, to mean that the entirety of Respondent's premises is considered a ''work area'' by Respondent and, accordingly, that distribution of literature and other printed matter was prohibited anywhere on Respondent's premises. There is no evidence that Respondent ever communicated a more limited interpretation to its employees. ''Where ambiguities appear in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees who are required to obey it.'' *Paceco*, 237 NLRB 399 fn. 8 (1978). Therefore, by maintaining the rule recited in paragraph 16 of its miscellaneous rules until November, Respondent violated Section 8(a)(1) of the Act.

CONCLUSION OF LAW

Norris/O'Bannon, a Dover Resources Company committed unfair labor practices affecting commerce by discharging Alfred Wells because of his union activities, in violation of Section 8(a)(3) and (1) of the Act, and by coercively interrogating an employee about union activities and by maintaining unlawful no-solicitation and no-distribution rules, in violation of Section 8(a)(1) of the Act.

REMEDY

Having found that Norris/O'Bannon, a Dover Resources Company engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and, further, that it be ordered to take certain affirmative action to effectuate the policies of the Act. With respect to the latter, it shall be ordered to offer Alfred Wells immediate and full reinstatement to the position of tool and cutter grinder, dismissing, if necessary, anyone who may have been hired or assigned to perform the work from which he was terminated on July 13, 1990, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges,[7] and to make Wells whole for any loss of pay he may have suffered be-

[7] During the hearing I precluded litigation concerning Wells' suitability for continued employment in light of certain facts that had not been known to Respondent at the time of its termination decision and, accordingly, that had not been an element in its motivation for deciding to terminate Wells. My ruling, of course, was based upon the well-settled principle that the sole issue at this stage is ''whether [R]espondent was guilty of committing [an] unfair labor practice[].'' *NLRB v. Edgar Spring, Inc*., 800 F.2d 595, 600 (6th Cir. 1989). By contrast, the more general determination of suitability for continued employment, because of some fact(s) unrelated to the actual termination motivation, is a ''remedial question[] . . . appropriately resolved in the compliance stage of unfair labor practice proceedings,'' *Hotel & Restaurant Employees Local 1064 (Service American)*, 298 NLRB 827 (1990), and, should it become necessary, Respondent can ''litigate this remedial issue during the compliance process.'' *E.E.C., Inc*., 297 NLRB 943 fn. 1 (1990).

cause he was unlawfully terminated, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co*., 90 NLRB 289 (1950), and with interest to be paid on the amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, it shall be ordered, to the extent it has not already done so, to rescind or modify the rules appearing in its employee handbook so that employees are not prohibited from solicitation for purposes protected by Section 7 of the Act during nonworking time and are not prohibited from distribution of literature for purposes protected by Section 7 of the Act during nonworking time in nonworking areas of its premises and, further, to distribute new copies of that handbook, with the rules as rescinded or modified, to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Norris/O'Bannon, a Dover Resources Company, Tulsa, Oklahoma, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against Alfred Wells or any other employee because of activity on behalf of International Association of Machinists and Aerospace Workers, AFL–CIO or any other labor organization.

(b) Interrogating employees about activities on behalf of any labor organization.

(c) Maintaining rules that prohibit employees from soliciting for purposes protected by Section 7 of the Act during nonworking time or from distributing literature for purposes protected by Section of the Act during nonworking time in nonworking areas of its Tulsa, Oklahoma facility.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Alfred Wells immediate and full reinstatement to the position of tool and cutter grinder, dismissing, if necessary, anyone who may have been hired or assigned to the position from which he was unlawfully terminated on July 13, 1990, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered as a result of his discriminatory termination, in the manner set forth above in the remedy section of this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Rescind or modify the rules appearing in its employee handbook so that employees are not prohibited from solicitation for purposes protected by Section 7 of the Act during nonworking time and are not prohibited from distribution of literature for purposes protected by Section 7 of the Act during nonworking time in nonworking areas of its premises and, further, distribute to all employees a copy of the employee handbook with the rules so rescinded or modified.

(d) Post at its Tulsa, Oklahoma facility copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''